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IN THE

Supreme Court of the United States

GEORGIA-PACIFIC CORPORATION
SALARIED EMPLOYEES RETIREMENT PLAN AND
GEORGIA-PACIFIC CORPORATION,
Petitioners,

v.

JERRY L. LYONS, individually and on
behalf of all other persons similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

PETER Q. BASSETT
GREGORY C. BRADEN
JASON N. POULOS
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7000

CARTER G. PHILLIPS*
ALAN CHARLES RAUL
TIMOTHY D. HAWKES
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

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REPLY BRIEF OF PETITIONER

Respondent's Opposition diverts attention from the fundamental issue in this case: whether it is unlawful under ERISA for cash balance plan sponsors to provide former employees with the option of choosing to receive a "lump sum" distribution in the amount equal to their stated account balances. Respondent, and the decision below, rely on regulatory restrictions that either do not exist or do not apply, and they would force plans to use valuation rules that are neither legally required nor logically suited for cash balance plans. This starkly violates ERISA's principle that employers are free to choose whether to have an employee benefit plan at all and, if so, what kind of benefits will be provided. It violates Congress's directive that the parallel standards of ERISA and the Tax Code be interpreted and applied consistently. And, it violates the principle that parties are entitled to fair notice of government regulations that could expose them to liability.

The Opposition's inconsistent assertions attempt to conceal the absence of any statutory or regulatory text imposing a "project-forward" requirement and prohibiting the Plan's lump sum provision. Respondent's convoluted explanations underscore the need for this Court's review to correct the decision below and thereby restore a basic precept of ERISA – "That the private parties, not the Government, control the level of benefits." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981).

ARGUMENT

Respondent suggests the petition presents no new or compelling issues. This is wrong. As noted in the briefs of *amici*, the issues presented here are of enormous importance and concern to the employers and employees of this country. If uncorrected, the error of the decision below will "have a chilling effect on the development and maintenance of private

employer pension plans across the U.S. economy." NAM/ ABC Br. 6-7; see also Unifi/Towers Br. 3 (the decision below "makes it difficult if not impossible for cash balance plans to operate as intended"). Moreover, as the General Accounting Office ("GAO") has found, although most companies have considered adopting cash balance plans, many firms describe "uncertainty about possible changes in the regulations of cash balance plans" as a "[k]ey reason[]" for not adopting such a plan. GAO, *Cash Balance Plans: Implications for Retirement Income* 5 (2000), *available at* http://www.gao.gov/new.items/he00207.pdf ("*GAO Report*").[1]

The IRS has issued favorable determination letters to this Plan and to many other cash balance plans that do not incorporate the whipsaw valuation rule, but in 1996 issued Notice 96-8, a tentative guidance document that contemplates making the Plan, and others like it, illegal. The IRS's vacillating stance has provided little or conflicting guidance as to the legal requirements for cash balance plans. Not surprisingly, the GAO found in its review of cash balance plans that "no SPD [Summary Plan Description] explained that there was a difference between the hypothetical account balance [under a cash balance plan] and the accrued benefit. In fact, some SPDs specifically stated that the account balance was equivalent to the accrued benefit [as Petitioners' Plan does in its lump sum provision]." *GAO Report* at 38. Significantly, the GAO did *not* conclude that any plan violated ERISA or any Treasury or Labor Department regulation because it provided – like Petitioners' Plan – that account balances were "equivalent" to accrued benefits.

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[1] The Opposition unfairly and inaccurately vilifies cash balance plan conversions. Opp. 7. There is no evidence (or allegation) that the Plan reduced future benefits for Mr. Lyons or other participants. Indeed, Respondent perversely seeks to make a fault of the Plan's generosity by arguing that ERISA is violated "if the plan's interest crediting rate *exceeds* the applicable discount rate." *Id.* at 6 (emphasis added).

Under these circumstances, Petitioners and similarly situated plan sponsors are stuck in a legal limbo that supports the grant of review. Petitioners never received fair notice of the purported regulatory restraint prohibiting them from adopting the lump sum benefit at issue here, and the Court's review could clarify the rule of *Alessi* that private parties are free to set the terms of their pension plans and confirm that what ERISA does not explicitly prohibit, it permits. See also *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996) (ERISA does not mandate what kinds of benefits employers must provide if they choose to provide benefits).

A. Respondent Received The Full Benefits To Which He Was Entitled.

As the Seventh Circuit recently held in affirming the dismissal of a class action suit under ERISA, "since [the employee] received the full benefits to which the plan documents entitled him, he has no basis for complaining of a violation of the terms of the plan or a forfeiture of vested benefits." *Brengettsy* v. *LTV Steel (Republic) Hourly Pension Plan*, No. 00-2204, 2001 WL 195204, at *3 (7th Cir. Feb. 28, 2001). That, of course, is precisely the case here.

The Plan documents expressly provide, as an "optional form of benefit," that a participant may elect to receive a lump sum distribution equal to his or her account balance – a benefit that does not include interest credits projected forward to retirement. The Plan states unequivocally:

> Option C: *Lump Sum Payment.* A single [l]ump sum payment equal to the amount credited to the [p]articipant's Personal Account as of the end of the month preceding his Benefit Commencement Date.

Plan § 6.4 (Pet. App. 74a). The definition of "Benefit Commencement Date" also could not be clearer:

> Benefit Commencement Date means for each Participant or Beneficiary, in the case an annuity form of

> distribution, the first day of the first period for which an amount is payable as an annuity under this Plan and, in the case of a lump sum payment, the first date on which all events have occurred which entitle the Participant to payment under this Plan.

Plan § 1.5 (Opp. App. A-123). Respondent concedes that he "waiv[ed] the annuity form of benefit and elect[ed], instead, a lump sum." Opp. 10. Under the clear terms of the Plan, this means he voluntarily requested and received a "[l]ump sum payment equal to the amount credited to [his] Personal Account as of the end of the month preceding his Benefit Commencement Date," (Pet. App. 74a) which "in the case of a lump sum payment, [is] the first date on which all events have occurred which entitle the Participant to payment under this Plan" (the date Respondent requested a lump sum distribution of his vested benefits) (Opp. App. A-123). Respondent voluntarily chose to receive the distribution of his account balance as expressly provided under Plan § 6.4(C). See Opp. 23 n.18. Like the plaintiff in *Brengettsy*, Respondent received the full benefit to which he was entitled and thus "has no basis for complaining."

B. The Plan Does Not Require Interest Credits To Be Projected Forward.

Respondent has not cited any specific Plan provision requiring interest credits to be projected forward. He cannot do so because there is no such provision. Respondent and the court of appeals erroneously rely on a provision for crediting account balances *left in the Plan* (Plan § 3.5(b) (Opp. App. A-126)), which provides as follows:

> Until the Benefit Commencement Date, each Personal Account shall be adjusted as of the end of each calendar month by an amount equal to the product of the Periodic Adjustment Percentage for the applicable Plan Year and

> the Personal Account balance at the beginning of such month.

Id.

Obviously, this provision does not provide for interest credits beyond the "Benefit Commencement Date," which, in the case of an optional lump sum benefit, occurs when the participant elects to receive it (almost always well before the normal retirement age of 65). See Plan § 1.5 (Opp. App. A-123) (quoted *supra* at 3-4). This is precisely why Respondent and the Eleventh Circuit rely so heavily on Notice 96-8 to bootstrap a "project-forward" requirement into the Plan.[2]

Respondent and the court of appeals make a basic mistake in confounding interest credits earned on account balances that remain invested in the Plan with interest projections for amounts withdrawn from the Plan. Rather than earning interest in the Plan, amounts withdrawn will earn interest (or other income) in whatever manner the former participant chooses to invest the distributed sums. There is nothing in the law or the Plan that entitles Respondent to double interest.

C. Respondent Fails To Refute The Plain Language Of ERISA § 203(e).

Respondent's Opposition makes it painfully obvious that, before the IRS's tentative "request for comments" in Notice 96-8, there was no statute or regulation in effect rendering the Plan or its lump sum provision unlawful. The Opposition makes lengthy and convoluted efforts to impose general

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[2] Ironically, the Opposition argues that the Plan itself (Appendix A, Section D (Opp. App. A-131)) provides for the use of the PBGC immediate annuity rate, not the interest crediting rate, to determine "actuarial equivalence," both for projecting forward and discounting back. Opp. 24. Thus, even under Respondent's argument regarding "actuarial equivalence," the Plan would project forward at the PBGC immediate rate and, as the Eleventh Circuit noted, pay Mr. Lyons the amount of his account balance – exactly what he received. Pet. App. 4a, 6a.

interest rate restrictions on voluntary lump sum distributions by cash balance plans.[3] Opp. 13-20. But while Respondent argues (correctly) that the purpose of § 203(e) is to prevent employers from manipulating discount rates to minimize lump sum distributions under defined benefit plans, Respondent is the one manipulating § 203(e) and conjuring up a "project-forward" requirement for the purpose of generating a windfall.

In any event, ERISA § 203(e)'s text does not limit the right of plans to include optional lump sum benefits in the amount equal to the participant's account balance. The statute solely addresses discount rates for present value purposes to determine whether distributions can be made without consent. As both the IRS and GAO have found, many or "most" cash balance plans do in fact provide for such lump sum payments, see I.R.S. Notice 96-8 (Pet. App. 60a-61a); *GAO Report* at 38, and the interest rate provisions of § 203(e) have not stopped the IRS from issuing favorable determination letters.

The Opposition is thus compelled to rely almost entirely on Notice 96-8, a tentative, prospective notice, issued by the IRS some three years *after* Respondent requested and received his lump sum distribution. Tellingly, neither the discount rate provisions of § 203(e), nor the publication of Notice 96-8 caused the IRS to withdraw the favorable determination letters issued to the Plan, or to "revoke the large numbers of favorable determination letters that it has issued cash balance plans that do not apply the whipsaw approach." Unifi/Towers Br. 14 n.11.

In fact, Notice 96-8 actually undermines Respondent's argument because the Notice recognized that "most" cash balance plans were designed just like Petitioners' Plan:

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[3] Respondent seems to bring a "psychic['s]" intuition to the laws and regulations, *see United States* v. *Chrysler Corp.*, 158 F.3d 1350, 1375 (D.C. Cir. 1998).

> *Most cash balance plans* also are designed to permit, after termination of employment, a distribution of an employee's entire accrued benefit in the form of a single distribution *equal to the employee's hypothetical account balance as of the date of the distribution*.

I.R.S. Notice 96-8 (Pet. App. 60a-61a) (emphasis added). The IRS's guidance was "prospective," did not indicate such "account balance" distributions were unlawful, and did not require (or even encourage) cash balance plans that were allowing lump sum distributions equal to account balances (like Petitioners') to change their plans. Not surprisingly, then, the GAO Report indicates that many plans have not conformed their lump sum provisions to the tentative guidance described in Notice 96-8. See generally, *GAO Report* at 38.

D. The Favorable IRS Determination Letters Cannot Be Dismissed.

Respondent fails to recognize the practical and legal significance of the determination letters issued to the Plan. In particular, Respondent mistakenly argues that determination letters only implicate a few, discrete sections of the Tax Code. See Opp. 25. A determination that a plan is "tax qualified" under § 401 necessarily requires a determination that the Plan satisfies many other Code provisions, including §§ 411 and 417. See, *e.g.*, 26 U.S.C. § 401(a)(7) and (11) (referencing §§ 411 and 417).[4] The IRS worksheets used by IRS personnel to verify a plan's tax qualification status confirm the

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[4] Respondent mistakenly relies on 26 C.F.R. § 601.201(o)(2) to call into question the favorable determination letters the IRS issued to the Plan. Respondent states that this regulation drains the letters of any approval regarding the statutory sections at issue in this petition. Opp. 25. For the reasons already discussed, that is absurd. Although the regulation suggests that a plan may not seek a determination letter as to certain Code sections in isolation, it does not limit the scope of the inquiry the IRS must undertake to determine whether a plan is "tax qualified."

broad scope of the inquiry – requiring, *inter alia*, that the IRS verify compliance with §§ 411 and 417. See, *e.g.*, IRS Form 5624, at V.g. (Pet. App. 77a) ("Does the plan satisfy the § 417 interest rate limitations . . . ?"), and at VI.a.-c. (*id.* at 77a-78a) (addressing § 411 vesting requirements).

Respondent relies on *Christensen* v. *Harris County*, 529 U.S. 576 (2000), to support his claim that IRS determination letters are entitled to "no deference." See Opp. 26 n.21. In *Christensen*, however, this Court recognized that agency interpretations and opinion letters are entitled to at least *Skidmore* deference – even if they do not qualify for full *Chevron* deference. *Christensen*, 529 U.S. at 587. Reasonable deference should be given to the IRS's original determination that the Plan satisfied all the requirements to be "tax qualified" here. The lump sum distribution provisions are clearly laid out in the Plan and comprise a key element of the Plan that the IRS would not reasonably have overlooked. Moreover, even if, as Respondent suggests, the IRS somehow "made a mistake" in issuing the determination letters (it did not), that would only confirm the regulatory uncertainty governing cash balance plans. Petitioners could not reasonably have been "on notice" of a "project-forward" requirement where the IRS has not adopted a formal regulation and, where the Agency itself has repeatedly confirmed the tax qualified status of the Plan as well as many other cash balance plans with similar lump sum provisions. See Unifi/Towers Br. 2-3.

E. *Firestone* Deference To Plan Administrators Does Not Affect The Standard For Appellate Review.

Respondent completely misunderstands *Firestone* deference and *de novo* appellate review. Opp. 20-21. Under *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 115 (1989), a court must defer to the reasonable interpretations of an ERISA plan made by an authorized plan administrator. Here, the Plan specifically authorizes the administrator to

interpret all provisions of the Plan, including the lump sum provision. Plan § 8.2 (Pet. App. 74a-75a); Holzman Letter (*id.* at 82a-85a). The court of appeals properly reviewed the district court's decision *de novo*, but the question here is entirely different: whether the court of appeals should have given reasonable deference to the Plan administrator's interpretation of the Plan's own terms. This issue was not briefed or argued before the district court and, indeed, could not have been, since it arose only when the court of appeals, *sua sponte*, chose to interpret the provisions of the Plan.

F. Respondent's Argument Undermines The Required Consistency Between ERISA And The Internal Revenue Code.

The Opposition fails to address – let alone refute – one of the central arguments made in the petition for certiorari: namely, that the Eleventh Circuit's decision opens a chasm between ERISA and the parallel provisions of the Tax Code, subjecting employers to inconsistent obligations under identically worded provisions. This dichotomy frustrates the clear congressional intent requiring consistency and predictability in the administration of employee benefit plans, and provides an important, additional reason why Supreme Court review is needed. See Unifi/Towers Br. 15-16 (Congress sought to limit conflicting regulatory requirements facing plan sponsors and fiduciaries under ERISA and the Internal Revenue Code).

G. Respondent Misapprehends Petitioners' Right To "Fair Notice" Of Potential Liability.

Respondent cites only Treasury Decision 8360 ("T.D. 8360") to support his argument that Petitioners had "considerable notice" of a "project-forward" requirement prior to Notice 96-8, concluding that T.D. 8360 "specifically informed cash balance plans that they must comply with the valuation rules under Code § 417(e) and TR 1.417(e)." Opp. 29 (emphasis omitted). To the contrary, T.D. 8360 actually reinforces the argument that the law does not require cash balance

plans to use a "project-forward" calculation. T.D. 8360 merely established a voluntary safe-harbor that cash balance plans could use to satisfy certain non-discrimination rules, not the interest rate provisions of § 203(e). As Respondent recognizes, the safe harbor was available to cash balance plans that "compl[ied] with the valuation rules applicable to defined benefit plans." *Id.* (emphasis omitted). T.D. 8360 thus establishes that cash balance plans were not ***required*** to conform to the valuation rules for defined benefit plans. Conformity was optional – necessary only if the plan chose to qualify for the non-discrimination safe harbor.

This was confirmed when the IRS issued Notice 96-8 as a request for comments so that the Agency could address the concerns and uncertainties raised by T.D. 8360 in future guidance. I.R.S. Notice 96-8 (Pet. App. 63a). Of course, the IRS never issued that guidance, and the rules applicable to cash balance plans remained unresolved. As the IRS, GAO, and the *amici* all recognize: many if not "most" cash balance plans still offer lump sum benefits like the one at issue, and numerous favorable determination letters for such plans remain outstanding. To this day, the IRS has never issued any regulation stating that cash balance plans may not provide optional lump sum benefits in an amount equal to the participant's account balance. If the Government ever tried to enforce the purported "project-forward" or "whipsaw" requirement against a cash balance plan, it would surely fail for lack of fair notice. See, *e.g.*, *General Elec. Co.* v. *EPA*, 53 F.3d 1324, 1333-34 (D.C. Cir. 1995). Given that Respondent unquestionably received what he was entitled to under the plain terms of the Plan, he has even less standing than the Government would have to impose liability on the Plan for this chimerical regulatory requirement.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

PETER Q. BASSETT
GREGORY C. BRADEN
JASON N. POULOS
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7000

CARTER G. PHILLIPS*
ALAN CHARLES RAUL
TIMOTHY D. HAWKES
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioners

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* Counsel of Record